**IN THE LABOUR COURT OF LESOTHO** **LC/REV/119/12**

**HELD AT MASERU**

In the matter between:

**LESOTHO PRECIOUS GARMENTS (PTY) LTD** **APPLICANT**

and

**MAKHETHA MATLALI** **1ST RESPONDENT**
**DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION** **2ND RESPONDENT**

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# JUDGMENT

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**09/06/15**

- ***Review of arbitral proceedings - on the grounds that the Arbitrator ignored the evidence tendered on behalf of the employer that the employee was guilty of gross misconduct and inappropriately ordered reinstatement - The issue being a question of evidence, the Court finds on the facts and evidence tendered that there was no evidence establishing the guilt of the employee - Order of reinstatement reversed as the Court found the relationship between the parties to have irretrievably broken down.***

- ***Authority - Issue of authority to represent a juristic person revisited***

***FACTUAL BACKGROUND TO THE DISPUTE***

1. The 1st respondent was dismissed for misconduct for allegedly taking money from his fellow employees. He had been engaged by the applicant as a Personnel Manager. He was charged with dishonesty, found guilty and dismissed. He subsequently referred a dispute challenging both the substantive and procedural fairness of his dismissal to the Directorate of Dispute Prevention and Resolution (DDPR) in ***A1101/11***. Substantively, on the basis that he had not committed the alleged acts of misconduct, and procedurally that he had not been given sufficient time to prepare for the disciplinary hearing and further that the chairperson thereof was biased as he was someone the Company usually uses to get rid of employees it no longer desires.

2. The 1st respondent faced two charges of dishonesty. The first charge related to the retention of a sum of Three Hundred and Sixty - Five Maloti (M365.00) he had allegedly received from one Matjeane, the Floor Supervisor. The latter had allegedly kept the money to herself fraudulently, but returned it after a disciplinary hearing had been held against her. This was money that was supposed to have been given as an incentive awarded weekly to employees who had reached the requisite target. Besides Matjeane having given the 1st respondent the money, he never remitted it to the deserving employees. There was no dispute that he had received this money. Management only got to know that it was in his possession when the concerned employees complained to the Human Resource Manager, Mr Lengana Ts'epe that they had not received their due incentive.

3. Secondly, he was charged with having retained a sum of Eight Hundred and Seventy- Two Maloti (M872.00) which had allegedly been paid to him by `Mathato Masitoe who had also been disciplinarily charged after having fraudulently clocked in for `Makhotso Lira during her absence from work for a period of about a month. The issue came to light when `Makhotso noticed that she had been paid despite her absence. Masitoe was charged with dishonesty. Her disciplinary hearing was scheduled to proceed on the 6th July, 2012 at 08:30 am but only proceeded in the afternoon of that day, chaired by the 1st respondent. This information is important as it is one of the critical factors in this dispute. She was found guilty and dismissed.

***APPLICANT'S CASE***

4. It was applicant's case that nobody in management knew that the 1st respondent had received the money from Matjeane and over and above that kept it for a long time when he knew that it ought to have long been paid to employees. 1st respondent's defence had been that he had kept the money because it was an exhibit and Company policy dictated that exhibits be kept for a period of six months after the finalisation of a disciplinary hearing. The applicant refuted that there was any Company policy relating to keeping of exhibits and the 1st respondent failed to produce such a policy.

5. Regarding the second charge Masitoe testified that the hearing only proceeded in the afternoon because the 1st respondent had ordered her to return the Eight Hundred and Seventy-Two Maloti (M872.00) before the commencement of the hearing, so that he could be lenient to her. She testified

that on the morning of the hearing she did not bring the money and the 1st respondent ordered her to go back and fetch it. She averred that she was with one `Malebereko Phaphathisa, a Floor Manager, when given the said instruction.

***1ST RESPONDENT'S DEFENCE***

6. 1st respondent's defence to the first charge was that he had kept the money under lock and key in his office. His reasoning was that it was Company policy to keep exhibits for about six months after a disciplinary hearing in case an employee challenged the Company's verdict before the DDPR and the money was needed as evidence. On the second charge, he denied ever demanding money from Masitoe. He pointed out that it was not true that the hearing was stood down to the afternoon because he had insisted on getting payment first but he had been busy with other office chores.

7. The learned Arbitrator made a finding in favour of the 1st respondent and ordered that he be reinstated to the position he occupied prior to his dismissal. This is the finding that the applicant is before this Court to have reviewed, corrected and set aside. As far as it was concerned, it was erroneous for him to have made a finding in favour of the 1st respondent under the circumstances.

***GROUNDS OF REVIEW***

8. The applicant contended that the learned Arbitrator committed the following irregularities in his award:-

i) That he disregarded the evidence that showed that the disciplinary hearing of Masitoe had proceeded in the afternoon when it had been scheduled for 08:30am because the 1st respondent had ordered her to fetch the money, testimony that was just thrown away on the basis that no one saw money being exchanged;

ii) Committing a mistake of law by interfering with the sanction imposed by the applicant which according to it was appropriate in light of the charges the 1st respondent faced, regard being had to his position in the Company. According to applicant's Counsel any reasonable employer would have dismissed in the circumstances;

iii) Overlooking the fact that given the managerial position the 1st respondent occupied, the trust relationship between him and the Company had broken down rendering reinstatement impractical.

***POINTS IN LIMINE***

9. In reaction to applicant's case, 1st respondent's Counsel raised three points in ***limine***. One; that the applicant had made out a case for appeal disguised as a review when this Court has no appeal jurisdiction in the matter; secondly; that the review application was filed outside the thirty (30) days prescribed by ***Section 228F of the Labour Code (Amendment) Act, 2000*** read together with ***Section 5 of the Labour Code (Amendment) Act, 2006*** in that the award having been handed down on 25th October, 2012, the applicant only filed the review application on 6th December, 2012; and lastly that the deponent to applicant's founding affidavit lacked the authority to depose to it on behalf of the applicant as he had not filed a resolution authorising him to institute the proceedings. He further argued that he was not the Managing Director, or senior enough to act on behalf of the applicant.

10. 1st respondent's Counsel, however, only pursued the last preliminary point on the issue of the authority. It is common cause that Mr Lengana Ts`epe, applicant's Personnel Manager had deposed to the founding affidavit filed on behalf of the applicant. He averred at paragraph 1 of the founding affidavit that as a Personnel Manager of the applicant he was ***"duly authorised to depose"*** thereto. He did not annex any Company resolution. Ideally, a resolution would provide proof that a deponent has been authorised to institute proceedings on behalf of a Company as articulated by Watermeyer J., in ***Mall (Cape) Pty Ltd v Merino Ko - operasie Bpk 1957 (2) SA 247 (C) at 315*** that ***"an artificial person unlike an individual, can function only through its agents, and can take decisions only by passing resolutions in the manner prescribed by its constitution … the best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution."***

11. While it is desirable that a resolution of the Board of Directors of a Company authorising litigation be annexed to the founding affidavit, allegations in the papers indicating authority would suffice. According to the case of ***Tattersall's and Another v Nedcor Bank Ltd 1995 (3) SA 222 (A) at p. 228 G-H***, a copy of a resolution of a company authorising the bringing of an

application need not always be annexed. On the issue of Mr Ts'epe's position in the Company, in our view, a Personnel Manager is an executive of a Company who deals with human resource issues of the Company including disciplinary matters, and as such can take decisions on behalf of the Company, unless the 1st respondent were to adduce evidence that he was not so authorised - ***See Parsons v Barkly East Municipality, 1952 (3) SA 595 (E), Mall (supra) at p. 352***, ***Lesotho Telecommunications Corporation v Nkuebe and others 1997-1998 LLRLB 438 at 445 – 447***, and ***Bushy Seotsanyana v Cashbuild (SA) (PTY) Ltd and the DDPR LC/REV/272/06***.

12. These cases have been cited with approval in a number of this Court's decisions on the issue including ***JHI Real Estate Ltd v Samuel Brandt Masia LC 90/05***. In ***casu***, there was neither an averment nor any evidence to the effect that Mr Ts'epe had no authority to make depositions on behalf of the applicant. It is our considered opinion that in the absence of any contrary evidence one can safely conclude that Mr Ts'epe had been duly authorised to depose to the founding affidavit on behalf of the applicant as he averred.

***THE REVIEW APPLICATION***

13. It was Masitoe's evidence that she had given the 1st respondent a sum of Eight Hundred and Seventy - Two Maloti (M872.00) after he had told her that he would not proceed with the hearing until the said amount had been tendered. She further testified that this conversation happened in the presence of one `Malebereko,[1] much as the latter did not see her give the 1st respondent the cash. She went on to state that she arrived at 08:00 am when the hearing was supposed to proceed at 08:30.[2] It is common cause that she raised the issue only in mitigation indicating that she was under the impression that the 1st respondent would tell that she had paid him, and she would be pardoned.

14. Masitoe does not appear to be a very reliable witness. She clearly knew that what she was doing was illicit, hence she was afraid to raise the issue of the money during the disciplinary hearing. This is evident in the words: ***"Actually l realised that Mr Makhetha was about to complete my issues without talking about the money and l was afraid to mention it straight, so that it could be clear that l gave him the money***."[3] `Malebereko testified that she was present when the 1st respondent ordered Masitoe to bring the money. The 1st respondent

[1] P. 103 of the record
[2] P. 18 of the record
[3] P. 40 of the record

could not controvert this piece of evidence. He simply denied that he did not ask Masitoe to bring any money. She, however, did not witness the money being paid.

15. On why the disciplinary hearing proceeded in the afternoon, the 1st respondent pointed out that he had been busy with a number of office chores. This evidence was not controverted.[4] He denied that he had said it was because his colleague Mr Makeoane would be proceeding to deliver a verdict on another case in the morning hours.

16. On the second charge, it was not disputed that the Three Hundred and Sixty - Five Maloti (M365.00) was found in a safe in 1st respondent's office. Mr Ts'epe, for the applicant, could not dispute in cross- examination that the money had been kept in the safe.[5] When the 1st respondent indicated that it was in the safe in his office one Thatasela, a fellow employee, was asked during the course of the disciplinary proceedings to go and fetch it and he found it in an envelope with other monies. It is therefore very difficult to discard 1st respondent's argument that he had kept the money in case Matjeane challenged her verdict before the DDPR, notwithstanding the fact that there appears to have been no Company policy to this effect.

17. It further emerged[6] that the Company provided no guidelines on how exhibits should be handled. The 1st respondent could therefore not be accused of infringing any Company regulation. His argument that he kept them for six months for the eventuality that parties challenged their decisions at the DDPR could be considered reasonable, particularly because unfair dismissals may be challenged within six months from the date of dismissal in terms of ***Section 227 (1) (a) of the Labour Code (amendment) Act, 2000***. We are not able to discern a dishonest intent on his part. In the circumstances, the learned Arbitrator's ruling in regard to the charges levelled against him cannot be faulted as there is no proof of dishonesty.

***WHETHER REINSTATEMENT IS AN APPROPRIATE RELIEF***

[4] P. 202 of the record
[5] P. 185 of the record
[6] P. 186 of the record

18. In terms of ***Section 73 of the Labour Code Order, 1992*** as amended by the ***Labour Code (amendment) Act, 2000***, reinstatement is a primary relief where an aggrieved party has been found to have been unfairly dismissed. It, however, goes on to provide that the Court may not order reinstatement where it considers it impracticable in light of the circumstances of the case. Looking at the record of proceedings, it is evident that the relationship between the applicant and the 1st respondent had irretrievably broken down. This renders reinstatement out of the question as an employment relationship is based on trust, particularly because the 1st applicant occupied a managerial position.

19. In exercising this discretion the Court is required to embark upon a ***"rational assessment of facts that are relevant and have been properly tendered in evidence"[7] and in so doing rely on considerations of 'common sense and justice."[8]*** It is at the end of the day a question of what is fair to both the employer and the employee. We considered the amount of compensation granted ***"just and equitable"[9]***as we took cognisance of the fact that the 1st respondent could not rebut Masitoe's evidence regarding the fetching of the money when it had been corroborated by `Malebereko, much as he was generally successful.

20. The Court having found no reason to disturb the learned Arbitrator's award comes to the following conclusion:-

i) That the review application is dismissed;

ii) That the 1st respondent is awarded compensation in an amount equivalent to six (6) months' of his wages;

iii) The said amount is payable within thirty (30) days from the receipt of this judgment; and

iv) There is no order as to costs.

***THUS DONE AND DATED AT MASERU THIS 09TH DAY OF JUNE, 2015.***

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[7] Brassey – Employment and Labour Law vol. 3 A8:73

[8] Hutchinson – 'The Nature of the Discretion to award compensation for a procedurally Unfair Dismissal' (2001) 22 ILJ 1527 at 1530

[9] Section 73 (2) of the Labour Code Order, 1992 as amended.

**F.M. KHABO**
**PRESIDENT OF THE LABOUR COURT (a.i)**

**P. LEBITSA** **I CONCUR**
**ASSESSOR**

**L. RAMASHAMOLE** **I CONCUR**
**ASSESSOR**

**FOR THE APPLICANT: Adv., N.T. NTAOTE**

**FOR THE 1ST RESPONDENT: Adv., L. MOLATI**